

AMENDED IN SENATE JUNE 28, 2012

AMENDED IN ASSEMBLY MAY 21, 2012

AMENDED IN ASSEMBLY MAY 16, 2012

AMENDED IN ASSEMBLY APRIL 16, 2012

CALIFORNIA LEGISLATURE—2011–12 REGULAR SESSION

ASSEMBLY BILL

No. 1929

Introduced by Assembly Member Gorell

(Coauthors: Assembly Members Achadjian, Cook, Donnelly, Galgiani, Hagman, Halderman, Harkey, Jeffries, Miller, Norby, Olsen, Portantino, and Silva)

February 22, 2012

An act to amend Sections 362, 19100, and 19103 of, to add Section 303.3 to, and to add Chapter 3.5 (commencing with Section 19260) to Division 19 of, the Elections Code, relating to elections, and declaring the urgency thereof, to take effect immediately.

LEGISLATIVE COUNSEL'S DIGEST

AB 1929, as amended, Gorell. Elections: casting ballots.

Existing law provides for the conduct of elections generally. Existing law prohibits the use of a voting system for an election unless it has been approved as meeting specified criteria by the Secretary of State prior to the election. Existing law defines a voting system as any mechanical, electromechanical, or electronic system and its software, or any combination of these used to cast or tabulate votes, or both.

This bill would exempt from the definition of a “voting system” a ballot marking system. The bill would define a ballot marking system to mean a mechanical, electromechanical, or electronic system and its

software that is used for the sole purpose of marking a ballot for a special absentee voter and that is not connected to a voting system at any time; ~~does not use a remote server to store the special absentee voter's identifiable selections that are transmitted to the server from the computer used by the special absentee voter via the Internet, and does not tabulate or have the capability to tabulate votes.~~

The bill would require the Secretary of State to study and adopt regulations governing the use of ballot marking systems. The bill would establish procedures to govern the approval of ballot marking systems by the Secretary of State. The bill would prohibit the use of a ballot marking system at an election until it has been approved by the Secretary of State as meeting prescribed criteria.

This bill would declare that it is to take effect immediately as an urgency statute.

Vote: $\frac{2}{3}$. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 303.3 is added to the Elections Code, to
2 read:

3 303.3. "Ballot marking system" means any mechanical,
4 electromechanical, or electronic system and its software that is
5 used for the sole purpose of marking a ballot for a special absentee
6 voter and is not connected to a voting system at any time; ~~does not~~
7 ~~use a remote server to store the special absentee voter's identifiable~~
8 ~~selections that are transmitted to the server from the computer used~~
9 ~~by the special absentee voter via the Internet, and does not tabulate~~
10 ~~or have the capability to tabulate votes.~~

11 SEC. 2. Section 362 of the Elections Code is amended to read:

12 362. "Voting system" means a mechanical, electromechanical,
13 or electronic system and its software, or any combination of these
14 used for casting a ballot, tabulating votes, or both. "Voting system"
15 does not include a ballot marking system.

16 SEC. 3. Section 19100 of the Elections Code is amended to
17 read:

18 19100. The Secretary of State shall study and adopt regulations
19 governing the use of voting machines, voting devices, vote
20 tabulating devices, and ballot marking systems.

1 SEC. 4. Section 19103 of the Elections Code is amended to
2 read:

3 19103. (a) (1) No later than 10 business days after the
4 Secretary of State approves the use of a new or updated voting
5 system, the vendor of the voting system shall cause an exact copy
6 of the approved source code for each component of the voting
7 system, including complete build and configuration instructions
8 and related documents for compiling the source code into object
9 code, to be transferred directly from the United States Election
10 Assistance Commission or the voting system testing laboratory,
11 which evaluated the voting system and is accredited by the United
12 States Election Assistance Commission, and deposited into an
13 approved escrow facility.

14 (2) No later than 10 business days after the Secretary of State
15 approves the use of a new or updated ballot marking system, the
16 vendor of the ballot marking system shall cause an exact copy of
17 the approved source code for each component of the ballot marking
18 system, including complete build and configuration instructions
19 and related documents for compiling the source code into object
20 code, to be deposited into an approved escrow facility.

21 (b) The Secretary of State shall adopt regulations relating to all
22 of the following:

23 (1) The definition of source code components of a voting system
24 or ballot marking system, including source code for all firmware
25 and software of the voting system or ballot marking system.
26 Firmware and software shall include commercial off-the-shelf or
27 other third-party firmware and software that is available and able
28 to be disclosed by the vendor of the voting system or ballot marking
29 system.

30 (2) Specifications for the escrow facility, including security and
31 environmental specifications necessary for the preservation of the
32 voting system or ballot marking system source codes.

33 (3) Procedures for submitting voting system or ballot marking
34 system source codes.

35 (4) Criteria for access to voting system or ballot marking system
36 source codes.

37 (5) Requirements for the vendor to include in the materials
38 deposited in escrow build and configuration instructions and
39 documents so that a neutral third party may create, from the source

1 codes in escrow, executable object codes identical to the code
2 installed on approved voting systems or ballot marking systems.

3 (c) The Secretary of State shall have reasonable access to the
4 materials placed in escrow, under the following circumstances:

5 (1) In the course of an investigation or prosecution regarding
6 vote counting or ballot marking equipment or procedures.

7 (2) Upon a finding by the Secretary of State that an escrow
8 facility or escrow company is unable or unwilling to maintain
9 materials in escrow in compliance with this section.

10 (3) In order to fulfill the provisions of this chapter related to the
11 examination and approval of voting systems or ballot marking
12 systems.

13 (4) In order to verify that the software on a voting system, voting
14 machine, vote tabulating device, or ballot marking system is
15 identical to the approved version.

16 (5) For any other purpose deemed necessary to fulfill the
17 provisions of this code or Section 12172.5 of the Government
18 Code.

19 (d) The Secretary of State may seek injunctive relief requiring
20 the elections officials, approved escrow facility, or any vendor or
21 manufacturer of a voting machine, voting system, vote tabulating
22 device, or ballot marking system to comply with this section and
23 related regulations. Venue for a proceeding under this section shall
24 be exclusively in Sacramento County.

25 (e) This section applies to all elections.

26 SEC. 5. Chapter 3.5 (commencing with Section 19260) is added
27 to Division 19 of the Elections Code, to read:

28
29 CHAPTER 3.5. APPROVAL OF BALLOT MARKING SYSTEMS
30

31 19260. The Secretary of State shall not approve any ballot
32 marking system, or part of a ballot marking system, unless it fulfills
33 the requirements of this code and the regulations of the Secretary
34 of State.

35 19261. (a) A ballot marking system, in whole or in part, shall
36 not be used unless it has received the approval of the Secretary of
37 State prior to the election at which it is to be first used.

38 (b) A jurisdiction shall not purchase or contract for a ballot
39 marking system, in whole or in part, unless it has received the
40 approval of the Secretary of State.

1 19262. (a) A person or corporation owning or having an
2 interest in a ballot marking system or a part of a ballot marking
3 system may apply to the Secretary of State to examine it and report
4 on its accuracy and efficiency to fulfill its purpose. As part of its
5 application, the vendor of a ballot marking system or a part of a
6 ballot marking system shall notify the Secretary of State in writing
7 of any known defect, fault, or failure of the version of the hardware,
8 software, or firmware of the ballot marking system or a part of the
9 ballot marking system submitted. The Secretary of State shall not
10 begin his or her examination until he or she receives a completed
11 application from the vendor of the ballot marking system or a part
12 of the ballot marking system. The vendor shall also notify the
13 Secretary of State in writing of any defect, fault, or failure of the
14 version of the hardware, software, or firmware of the ballot
15 marking system or a part of the ballot marking system submitted
16 that is discovered after the application is submitted and before the
17 Secretary of State submits the report required by Section 19267.
18 The Secretary of State shall complete his or her examination
19 without undue delay.

20 (b) After receiving a vendor's written notification of a defect,
21 fault, or failure, the Secretary of State shall notify the United States
22 Election Assistance Commission or its successor entity of the
23 problem as soon as practicable so as to present a reasonably
24 complete description of the problem. The Secretary of State shall
25 subsequently submit a report regarding the problem to the United
26 States Election Assistance Commission or its successor entity. The
27 report shall include any report regarding the problem submitted
28 to the Secretary of State by the vendor.

29 (c) The following definitions apply for purposes of this chapter:

30 (1) "Defect" means any flaw in the hardware or documentation
31 of an approved or conditionally approved ballot marking system
32 that could result in a state of unfitness for use or nonconformance
33 to the manufacturer's specifications.

34 (2) "Failure" means a discrepancy between the external results
35 of the operation of any software or firmware in an approved or
36 conditionally approved ballot marking system and the
37 manufacturer's product requirements for that software or firmware.

38 (3) "Fault" means a step, process, or data definition in any
39 software or firmware in an approved or conditionally approved

1 ballot marking system that is incorrect under the manufacturer's
2 program specification.

3 19263. The Secretary of State may make all arrangements for
4 the time and place to examine ballot marking systems proposed
5 to be sold in this state. He or she shall furnish a complete report
6 of the findings of the examining engineers to the Governor and
7 the Attorney General.

8 19264. (a) Prior to giving his or her decision approving or
9 withholding approval of any ballot marking system, the Secretary
10 of State shall hold a public hearing to give interested persons an
11 opportunity to express their views for or against the system.

12 (b) The Secretary of State shall give notice of the hearing in the
13 manner prescribed in Section 6064 of the Government Code in a
14 newspaper of general circulation published in Sacramento County.
15 The Secretary of State shall also transmit written notice of the
16 hearing, at least 30 days prior to the hearing, to each county
17 elections official, to any person that the Secretary of State believes
18 will be interested in the hearing, and to any person who requests,
19 in writing, notice of the hearing.

20 (c) The decision of the Secretary of State, either approving or
21 withholding approval of a ballot marking system, shall be in writing
22 and shall state the findings of the Secretary of State. The decision
23 shall be open to public inspection.

24 19265. The Secretary of State shall establish the specifications
25 for and the regulations governing ballot marking systems, and the
26 related software. The criteria for establishing the specifications
27 and regulations shall include, but not be limited to, the following:

28 (a) The system and its software shall be suitable for the purpose
29 for which it is intended.

30 (b) The system shall preserve the secrecy of the ballot.

31 (c) The system shall be safe from fraud or manipulation.

32 19266. For the purpose of assistance in examining a ballot
33 marking system, the Secretary of State may employ not more than
34 three expert electronic technicians at a cost to be set by the
35 Secretary of State. The compensation of the electronic technicians
36 shall be paid by the person or corporation submitting the ballot
37 marking system.

38 The Secretary of State may require the person or corporation
39 submitting the ballot marking system to deposit sufficient funds
40 to guarantee the payment of the examination charges. The Secretary

1 of State may deposit the funds in an appropriate treasury trust
2 account and, within 30 days after his or her report of examination,
3 draw a refund check to the credit of the person or corporation for
4 any amount in excess of costs.

5 19267. Within 30 days after completing the examination of
6 any ballot marking system, the Secretary of State shall place on
7 file a report stating whether, in his or her opinion, the kind of ballot
8 marking system examined can safely be used. The report shall also
9 contain a written or printed description and drawings and
10 photographs clearly identifying the system and its operation.

11 19268. If the report states that the ballot marking system can
12 be used, it shall be deemed approved by the Secretary of State and
13 systems of its kind may be adopted for use at elections.

14 19269. Within 10 days after filing the report, the Secretary of
15 State shall send a copy to the board of supervisors of each county.

16 19270. (a) When a ballot marking system has been approved
17 by the Secretary of State, the vendor shall notify the Secretary of
18 State and all local elections officials who use the system in writing
19 of any defect, fault, or failure of the hardware, software, or
20 firmware of the system or a part of the system within 30 calendar
21 days after the vendor learns of the defect, fault, or failure.

22 (b) After receiving a vendor's written notification of a defect,
23 fault, or failure pursuant to subdivision (a), the Secretary of State
24 shall notify the United States Election Assistance Commission or
25 its successor entity of the problem as soon as practicable so as to
26 present a reasonably complete description of the problem. The
27 Secretary of State shall subsequently submit a report regarding the
28 problem to the United States Election Assistance Commission or
29 its successor entity. The report shall include any report regarding
30 the problem submitted to the Secretary of State by the vendor.

31 19271. When a ballot marking system has been approved by
32 the Secretary of State, it shall not be changed or modified until the
33 Secretary of State has been notified in writing and has determined
34 that the change or modification does not impair its accuracy and
35 efficiency sufficient to require a reexamination and reapproval
36 pursuant to this chapter. The Secretary of State may adopt rules
37 and regulations governing the procedures to be followed in making
38 his or her determination as to whether the change or modification
39 impairs accuracy or efficiency.

1 19272. The Secretary of State may seek injunctive and
2 administrative relief when a ballot marking system has been
3 compromised by the addition or deletion of hardware, software,
4 or firmware without prior approval or is defective due to a known
5 hardware, software, or firmware defect, fault, or failure that has
6 not been disclosed pursuant to Section 19270.

7 19273. (a) The Secretary of State may seek all of the following
8 relief for an unauthorized change in hardware, software, or
9 firmware in a ballot marking system approved or conditionally
10 approved in California:

11 (1) A civil penalty from the offending party or parties, not to
12 exceed ten thousand dollars (\$10,000) per violation. For purposes
13 of this subdivision, each ballot marking system component found
14 to contain the unauthorized hardware, software, or firmware shall
15 be considered a separate violation. A penalty imposed pursuant to
16 this subdivision shall be apportioned 50 percent to the county in
17 which the violation occurred, if applicable, and 50 percent to the
18 Office of the Secretary of State for purposes of bolstering ballot
19 marking system security efforts.

20 (2) Immediate commencement of proceedings to withdraw
21 approval for the ballot marking system in question.

22 (3) Prohibiting the manufacturer or vendor of a ballot marking
23 system from doing elections-related business in the state for one,
24 two, or three years.

25 (4) Refund of all moneys paid by a local agency for a ballot
26 marking system or a part of a ballot marking system that is
27 compromised by an unauthorized change or modification, whether
28 or not the ballot marking system has been used in an election.

29 (5) Any other remedial actions authorized by law to prevent
30 unjust enrichment of the offending party.

31 (b) (1) The Secretary of State may seek all of the following
32 relief for a known but undisclosed defect, fault, or failure in a
33 ballot marking system or part of a ballot marking system approved
34 or conditionally approved in California:

35 (A) Refund of all moneys paid by a local agency for a ballot
36 marking system or part of a ballot marking system that is defective
37 due to a known but undisclosed defect, fault, or failure, whether
38 or not the ballot marking system has been used in an election.

39 (B) A civil penalty from the offending party or parties, not to
40 exceed fifty thousand dollars (\$50,000) per violation. For purposes

1 of this subdivision, each defect, fault, or failure shall be considered
2 a separate violation. A defect, fault, or failure constitutes a single
3 violation regardless of the number of ballot marking system units
4 in which the defect, fault, or failure is found.

5 (C) In addition to any other penalties or remedies established
6 by this section, the offending party or parties shall be liable in the
7 amount of one thousand dollars (\$1,000) per day after the
8 applicable deadline established in Section 19270 until the required
9 disclosure is filed with the Secretary of State.

10 (2) A penalty imposed pursuant to subparagraph (B) or (C) of
11 paragraph (1) shall be deposited in the General Fund.

12 (c) Prior to seeking any measure of relief under this section, the
13 Secretary of State shall hold a public hearing. The Secretary of
14 State shall give notice of the hearing in the manner prescribed by
15 Section 6064 of the Government Code in a newspaper of general
16 circulation published in Sacramento County. The Secretary of
17 State also shall transmit written notice of the hearing, at least 30
18 days prior to the hearing, to each county elections official, the
19 offending party or parties, any persons that the Secretary of State
20 believes will be interested in the hearing, and any persons who
21 request, in writing, notice of the hearing.

22 (d) The decision of the Secretary of State, to seek relief under
23 this section, shall be in writing and state his or her findings. The
24 decision shall be open to public inspection.

25 19274. (a) The Secretary of State may seek injunctive relief
26 requiring an elections official, or any vendor or manufacturer of
27 a ballot marking system, to comply with the requirements of this
28 code, the regulations of the Secretary of State, and the
29 specifications for the ballot marking system, and its software,
30 including the programs and procedures for vote marking and
31 testing.

32 (b) Venue for a proceeding under this section shall be
33 exclusively in Sacramento County.

34 19275. A ballot marking system ~~shall comply with all of the~~
35 ~~following:~~

36 ~~(a) A ballot marking system or part of a ballot marking system~~
37 ~~shall not store any voter identifiable selections on any remote~~
38 ~~server and shall not tabulate or have the capability to tabulate votes.~~
39 ~~It is unlawful for any provider of online ballot marking systems~~

1 to permanently capture and store any ballot marking data derived
2 from the process of marking a ballot. *do any of the following:*

3 (b) ~~A ballot marking system or part of a ballot marking system~~
4 ~~shall not electronically receive or transmit election data through~~
5 ~~an exterior communication network, including the public telephone~~
6 ~~system, when the communication originates from or terminates at~~
7 ~~a polling place, satellite location, or counting center.~~

8 (c) ~~A ballot marking system or part of a ballot marking system~~
9 ~~shall not transmit election data or images via wireless~~
10 ~~communications or wireless data transfers when the communication~~
11 ~~originates from or terminates at a polling place, satellite location,~~
12 ~~or counting center.~~

13 (a) *Have the capability, including an optional capability, to use*
14 *a remote server to mark a voter's selections transmitted to the*
15 *server from the voter's computer via the Internet.*

16 (b) *Have the capability, including an optional capability, to*
17 *store any voter identifiable selections on any remote server.*

18 (c) *Have the capability, including the optional capability, to*
19 *tabulate votes.*

20 SEC. 6. This act is an urgency statute necessary for the
21 immediate preservation of the public peace, health, or safety within
22 the meaning of Article IV of the Constitution and shall go into
23 immediate effect. The facts constituting the necessity are:

24 In order to avoid delays, prior to the upcoming statewide general
25 election, that are caused by current voting systems that
26 disenfranchise overseas voters and United States military personnel
27 serving overseas by preventing ballots from being returned to
28 elections officials in time to be counted, it is necessary that this
29 act take effect immediately.